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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

LIONEL RUBALCAVA,

Petitioner,

v.

TOM FELKER, Warden,

Respondent.

No. C 07-5379 SBA

**ANSWER TO ORDER TO
SHOW CAUSE**

Respondent, Tom Felker, Warden at High Desert State Prison at Susanville, California, provides this Answer to the Order to Show Cause.

**I.
CUSTODY**

Petitioner is lawfully confined in the custody of the California Department of Corrections and Rehabilitation, pursuant to a judgment imposed by the Santa Clara County Superior Court on August 6, 2004. A jury found petitioner guilty of attempted premeditated murder, Cal. Penal Code §§ 187, 189, 664, and returned findings that petitioner personally discharged a handgun causing great bodily injury, Cal. Penal Code §§ 1203(e)(3), 120227(a), 12022.53(b)-(d), and that the offense

1 was committed for the benefit of a criminal street gang, Cal. Penal Code § 186.22(b)(1). Petitioner
 2 admitted prior conviction allegations of one prior strike, Cal. Penal Code §§ 667(b)-(i), 1170.12, a
 3 prior serious felony conviction, Cal. Penal Code § 667(a), and one prior prison term commitment,
 4 Cal. Penal Code § 667.5(b). The trial court sentenced petitioner to state prison for 25 years to life
 5 and a consecutive determinate six-year term. *See* Respondent's Exhibit A (hereinafter "CT") at 260-
 6 63, 482-86, 621-24.

7 II.

8 STATE PROCEDURAL HISTORY

9 By information the Santa Clara District Attorney charged petitioner with attempted
 10 premeditated murder, Cal. Penal Code §§ 187, 189, 664. *See* Respondent's Exhibit A at 260-63
 11 (Clerk's Transcript hereinafter referred to as "CT"). The information alleged that petitioner
 12 personally discharged a handgun causing great bodily injury, Cal. Penal Code §§ 1203(e)(3),
 13 120227(a), 12022.53(b)-(d), and that the offense was committed for the benefit of a criminal street
 14 gang, Cal. Penal Code § 186.22(b)(1). *Id.* The information alleged one prior strike, Cal. Penal Code
 15 §§ 667(b)-(i), 1170.12, a prior serious felony conviction, Cal. Penal Code § 667(a), and one prior
 16 prison term commitment, Cal. Penal Code § 667.5(b). CT at 262.

17 Trial by jury commenced on November 10, 2003. CT at 396. On November 26, 2003,
 18 the jury found petitioner guilty as charged and found true all attendant enhancement allegations. CT
 19 at 482-85. Petitioner admitted the prior conviction allegations. CT at 486.

20 On August 6, 2004, the trial court imposed an indeterminate 25 years to life sentence and
 21 a consecutive determinate six-year term. CT at 621-24.

22 On December 28, 2005, the California Court of Appeal affirmed the judgment in an
 23 unpublished decision. *See* Respondent's Exhibit B.

24 On March 15, 2006, the California Supreme Court denied the petition for review. *See*
 25 Respondent's Exhibit C.

26 On August 15, 2007, the California Supreme Court denied the petition for writ of habeas
 27 corpus. *See* Respondent's Exhibit D.
 28

1 **III.**

2 **FEDERAL PROCEDURAL HISTORY**

3 On October 22, 2007, petitioner filed the instant petition for writ of habeas corpus under
4 28 U.S.C. § 2254. On November 8, 2007, the Court issued the Order to Respond.

5 **IV.**

6 **CLAIMS FOR RELIEF**

7
8 Respondent denies each of petitioner's claims, denies that any of petitioner's claims state
9 a basis for federal habeas corpus relief, and affirmatively alleges that petitioner's convictions did
10 not result from a violation of any federal constitutional right. Respondent incorporates by reference
11 the Points and Authorities filed in support of the Answer. Respondent specifically responds to each
12 claim as follows.

13 **Juror Misconduct Claim**

14 Petitioner has failed to show that the state court's disposition was "contrary to, or involved
15 an unreasonable application" of *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548
16 (1984), or "was based on an unreasonable determination of the facts in light of the evidence
17 presented in the State court proceeding." See 28 U.S.C. § 2254(d)(1), (2).

18 ***Crawford v. Washington* Claim**

19 Petitioner has failed to show that the state court's disposition was "contrary to, or involved
20 an unreasonable application" of *Crawford v. Washington*, 541 U.S. 36 (2004), or "was based on an
21 unreasonable determination of the facts in light of the evidence presented in the State court
22 proceeding." See 28 U.S.C. § 2254(d)(1), (2).

23 **Actual Innocence Claim**

24 Petitioner has failed to show that the state court's disposition was "contrary to, or involved
25 an unreasonable application" of clearly established United States Supreme Court precedent or "was
26 based on an unreasonable determination of the facts in light of the evidence presented in the State
27 court proceeding." See 28 U.S.C. § 2254(d)(1), (2).

V.**EXHAUSTION**

Petitioner exhausted his state remedies with respect to the federal claims in the instant petition. *Rose v. Lundy*, 455 U.S. 509 (1982); *see* Respondent's Exhibits C & D.

VI.**AVAILABLE TRANSCRIPTS AND RECORD**

Respondent has lodged with the Clerk of the Court copies of the relevant state record: Exhibit A (Clerk's Transcript); Exhibit B (California Court of Appeal Opinion); Exhibit C (Petition for Review and Order Denying Petition for Review); Exhibit D (Petition for Writ of Habeas Corpus and Supreme Court Order Denying Petition); Exhibit E (Reporter's Transcript of Partial Voir Dir Proceedings, pages 1-22); Exhibit F (Reporter's Transcript of Trial, pages 1-1138).

VII.**EXPRESS AND IMPLIED FACTUAL FINDINGS**

Respondent alleges that petitioner received a full and fair hearing on all of this claims in the state courts, and that all express and implied factual findings by the state courts are entitled to a presumption of correctness. 28 U.S.C. § 2254(d), (e)(1). Respondent denies that any claim made by petitioner requires an evidentiary hearing by this Court. 28 U.S.C. § 2254(e)(2).

VIII.**GENERAL DENIAL**

Respondent denies each and every factual or procedural allegation in the petition affording a basis for relief that has not been expressly admitted in the Answer. Respondent incorporates by reference any statements of fact material to the issues herein which are contained in the accompanying memorandum of points and authorities or in the exhibits filed with this Court, to the extent not inconsistent with the respondent's factual allegations herein.

CONCLUSION

Accordingly, respondent respectfully requests that the Court deny the petition for writ of habeas corpus.

Dated: January 3, 2008

Respectfully submitted,

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